> docket-into two discrete tasks. Both the scheduling and giving of notice of hearings are part of the judicial function of managing the bankruptcy court's docket in the resolution of disputes. This function is unquestionably discretionary in nature.

Referring to the decision in **Ashelman v. Pope,** 793 F.2d 1072 (9th Cir. 1986), *en banc,* Judge Wardlaw wrote that the "ultimate act" determines whether a function is judicial in nature. Here, the ultimate act was docket control which is a judicial function and therefore entitled to immunity.

Reminiscent of comments by Judge Rymer at oral argument, the opinion goes on to state:

> Most importantly, the giving of notice is part of the process due litigants. Fundamental fairness to the parties before the court requires notice of proceedings; notice is an essential part of the adjudicatory process. Therefore, we find immunity extends to the giving-or failure to give-notice, as well as to the scheduling of the hearing. At common law the bankruptcy trustee would have enjoyed immunity for the judicial function of controlling and managing her docket in the bankruptcy proceedings, and both the scheduling and noticing of the proceeding are a part of that discretionary function.

This analysis attempts, and largely achieves, a reconciliation of the two approaches to determinations of immunity. It first applies the integral part test and then determines whether the integral part is discretionary.

Unfortunately absent from the opinion is any discussion of the standard which should be applied by a bankruptcy court in determining whether suit should be allowed against a trustee. The panel simply states that the decision to allow suit is "within the sound discretion of the appointing court."

The fundamental import of **Castillo** is that acts of bankruptcy trustees that result in judicial action are likely to be immune from suit without regard to negligence by the trustee and without reference to resulting harm to parties. The last paragraph of the opinion notes that the decision is limited to acts which involve judicial action—the act which caused the damage in **Castillo** was the dismissal order entered by the court. One argument made by Curry but not resolved by the Ninth Circuit was that if the recipient of a message is immune from suit, then so is the messenger. This position was supported by **General Dynamics Corporation v. United States,** 139 F.3d 1280 (9th Cir. 1998), in which a person who negligently caused a prosecution was immune because the prosecutor was also immune. The **Castillo** panel left to another day the issue whether an act by a trustee which does not result in judicial action can be within the scope of immunity.

The outcome in **Castillo** is arguably not different from the result proposed in the National Bankruptcy Review Commission Final Report § 3.3.2 (1997). The Report was extensively argued in the briefs but found no place in the Circuit's opinion, perhaps because the Report focused on relieving trustees from liability for ordinary negligence provided certain formalities were observed, rather than focusing on immunity. *See Who, Why, When, supra,* at 236 *et seq.*

"RETAIL CHOICE" IS COMING: HAVE YOU HUGGED YOUR UTILITIES LAWYER TODAY? (PART II)

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In Part I, 2 Norton Bankr. L. Adviser 4 (2002), we described how utility contracts work and how they vary from industry to industry. That primer will help you understand how you might be able to use Retail Choice to improve the DIP's financial picture. It is safe to say that things have changed a bit in the U.S. economy and the electric industry since Part I was published.

Following submission of Part I for publication, several events dramatically altered the landscape in the quest to restructure the retail electric industry. First, Enron, Arthur Anderson, and then World Com collapsed in a heap of corporate mismanagement (some might say fraud) and accounting improprieties. Second, several of the major participants in California's retail competition effort have been accused of manipulating that market in an effort to drive up generation prices artificially. Third, several companies have admitted to engaging in swap trades (simultaneous sales and purchases of power or natural gas to and from the same seller and buyer, where no net sale or purchase takes place; it is a pure paper transaction) to artificially inflate the number of trades and transported volumes over the transportation network. Fourth, the Federal Energy Regulatory Commission finally stepped into the fray, submitting proposed rules for national power sales that could effectively force all states to move to a competitive marketplace.[3] Fifth, energy traders Dynegy and

Williams were caught in the net of post-Enron examinations of energy traders, and their stock prices plummeted.[4] Finally, the economic and financial effect of the current stock market plunge has made all consumers more conservative in their perspectives towards taking on additional risks.

The net effect of these events has been a significant slow-down in the movement towards a fully competitive retail marketplace. In fact, the California Utilities Commission has taken steps to reassert a fully-regulated environment in California, effectively doing away with retail competition in California. Articles calling for the re-regulation of Texas's electric industry have also recently appeared in the Houston Chronicle.[5] California and Texas notwithstanding, "[i]n most jurisdictions, deregulation is too late to turn back, many of the utilities have sold off their generation and they have to buy power."[6] Significantly, these events also make the topic of this article more important and timely to bankruptcy practitioners. Why? Because more people and more commercial and industrial companies are going to file for bankruptcy as a result of the economic downturn and losses stemming from the Enron and World Com debacles.

In Part II, we'll walk you through some issues that you'll face when you sort through the DIP's utilities needs. First, though, we'll give you a brief review of executory contracts under the Bankruptcy Code.

Nearly all of the DIP's existing utility service contracts (local and long distance telephone, natural gas, and electricity—but generally NOT including water or sewer)[7] are "executory contracts" under 11 U.S.C. § 365.[8] Several courts have simply taken this conclusion for granted.[9] But if you work through the Countryman definition, that conclusion makes some sense.[10] They have the requisite mutuality and the existence of unfulfilled obligations on both sides.[11] In every service contract, there is an obligation to provide service (from the utility) and an obligation to provide the utility with ongoing usage information (from the utility customer). Customer usage typically varies on both a seasonal and time-of-day basis. Therefore, in addition to owing payment for the service, the customer has a continuing obligation to order (or otherwise communicate) the correct amount of service to be provided. Money and the correct order flow in one direction; the utility's services flow in the other direction; hence, the contract is executory. The DIP has the traditional options under 11 U.S.C. § 365: to assume the executory contract, to reject it, or to assume and assign it. [See Norton Bankr. L. & Prac. 2d § 39:9.]

Let's face it, though: even if a bankruptcy lawyer could not technically wedge a utilities contract into the classic Countryman definition, *any* unexpired contract can be deemed executory if the bankruptcy court decides that the debtor can make use of it under section 365. Either the bankruptcy court can adopt Professor Jay Westbrook's more modern "functionality" analysis of contracts,[12] or it can simply assume[13] that the contract is executory and proceed with section 365 analysis accordingly.

Pursuant to 11 U.S.C. § 365(d)(2), the DIP[14] has until plan confirmation to decide whether to assume or reject its existing executory contracts.[15] Thus, the DIP may reject its *existing* utility contracts under 11 U.S.C. § 365 and replace them with *new, lower-priced* utility service contracts with either a new or the existing service provider.

Let's take a look at the various possibilities:

The table, on the facing page, assumes a market that is not especially active. Imagine, though, the leverage that the DIP can have in a fully competitive environment. With true competition, the DIP can threaten to reject an above-market (or an at-market) utility contract. (For example, if the DIP can find the same quality service from a smaller or more efficient utility, then it's possible that the contract will be at a slightly below-market price.) The current service provider may well be tempted to persuade the DIP to assume a ***modified*** (*read*: more competitive) utility contract in order to keep the DIP's business. If the current service provider doesn't want to modify the terms of its contract, then the DIP is free to reject the contract and enter into a post-petition contract with a new provider under new (competitive) terms.

DIP's choices	Contract requires an above-market price for the service provided	Contract requires a below-market price for the service provided	Contract requires a current-market price for the service provided
Assume	Unlikely, unless the cost of obtaining a substitute contract is higher than the executory contract's above-market price.	YES	YES, unless the DIP can find a service provider that will consider below-market rates (unlikely).
Reject	YES, assuming that another contract, at or below market price, can be negotiated.	NO	NO, unless the DIP can find a service provider that will consider below-market rates (unlikely).
Assume & assign	NO: no one else will be interested in the contract.	YES, if the DIP needs an immediate cash infusion.[16]	NO: there is no price advantage to getting rid of a market-rate contract by assigning it to another business, if such an assignment means having to go back into the market to find a new service provider. The transaction costs in looking for a new provider are likely to outweigh any possible intangible benefits.

The Practicalities of Treating Service Contracts as Executory Contracts.

If the new service contracts are more cost-effective, the DIP can potentially save significant amounts of money by rejecting the existing utility service contracts,[17] which of course inures to the benefit of everyone (especially the unsecured creditors).[18] There are, however, two important issues to consider before leaping into the void: (1) how does the DIP decide whether to assume or reject these complicated contracts; and (2) does the DIP have a duty to actively pursue bids for new contracts, especially if it doesn't have any particular experience with utility contracts?[19]

How does the DIP decide whether to assume or reject these contracts?

The first step in determining whether or not to reject the DIP's existing contracts is to ascertain exactly what utility service / service contracts the DIP currently has in place.[20] To do this, the DIP would need to review:

- the recent monthly bills to determine the type of natural gas and electricity service[21] that the DIP is currently receiving (e.g., tariff,[22] firm,[23] or interruptible[24]);
- the identity of the DIP's current utility service providers (gas, electric, telephone, etc); and
- the federal, state and local tariff provisions applicable to the DIP's current utility services situation.[25]

Once you know the type of service that the DIP is receiving, you need to ascertain the DIP's peak demand and peak and total usage on a monthly and an annual basis. The combination of DIP energy ***needs*** and ***type of service*** will set the parameters of its service demands and tell you approximately how much the DIP can expect to pay for its service. To determine peak and total monthly and annual energy demands and usage, DIP counsel should review:

- the last twelve monthly energy bills for ***each*** service at ***each*** facility, unless the DIP is already receiving a consolidated bill for its facilities, its services, or both;
- the type(s) of facilities that the DIP is currently being served in and is using (warehouses, retail locations, commercial office space, etc.). The monthly service charge as well as the usage rate / price for serving these facilities may be different (utilities like to price service to different types of facilities differently, like warehouses versus office buildings); and
- where the DIP's various facilities are geographically located.[26]

Given the sophistication of commercial customers today, the DIP should have this information readily at hand. If the DIP does not have such information, a phone call to the DIP's existing utility service provider(s) can generally supply this specific type and detail of information.

In utility services contracts, as in many restaurants, the customer can order service as either a complete meal or go á-la-carte. As discussed in Part I, obtaining and bringing a molecule of natural gas or an electron of electricity to an individual customer facility generally involves (1) a product producer, (2) one or more transporters, and (3) a local delivery provider.

In this context, traditional monopoly service was a bundled service, meaning that the local service provider did all the work and the customer received utility service without any involvement. In a *"bundled"* service contract, the customer authorizes its service provider to arrange and organize (bundle) all or some of these individual pieces of the energy delivery transaction together as a package for the customer. Bundled arrangements are significantly less time-consuming and burdensome for the customer (here, the DIP), who has shifted the burden and risk of nondelivery to the service provider. However, bundled contracts will likely be more costly because of the time savings and convenience for the DIP.

Conversely, in an *"unbundled"* utility services contract, the customer manages, arranges, and separately contracts for each of these separate component parts of the energy transaction from separate service providers. In the context of natural gas, it breaks down to one contract each for the gas producer, transport pipeline(s), and local gas utility. For electricity, it can be the generator, transmission line company, and local utility. Obviously, unbundled arrangements are considerably more time-consuming and labor intensive for the customer, who must constantly monitor and evaluate each aspect of the transaction chain.[27]

In addition to bundling service for a single utility product, some service providers may also offer to combine several different types of utility service together for the DIP. For example, a single provider may offer bundled service for not only natural gas and electricity, but also long distance telephone service. These contracts can be benefi-

cial to the DIP if the combined rates for the various utility services are below the individual cost of contracting with different providers for each of the service. Obviously, there are numerous permutations and variations of these themes, and the DIP may generally wish to seek advice from an expert before venturing into the utility contract briar patch.

Does the DIP have a duty actively to pursue new utility service bids?

The DIP owes a fiduciary duty to the bankruptcy estate.[28] Of course, no one actually knows what this claim of fiduciary duty means, but, at the very least, it must mean that, to the extent that it's cost-effective to "shop" utility contracts, the value of the estate will be increased if the DIP does that. The creditors' committee could also get involved in this estate—increasing effort, letting it be known that bids would be entertained.[29]

Let's assume that, in all but the smallest of Chapter 11 cases, it will always be cost-effective to *review* (if not necessarily to change) the DIP's utility needs and to shop bids in those locations in which Retail Choice is an option. After identifying the potential bidders,[30] there are a variety of ways to obtain the bids. Many of the marketing and energy companies presently soliciting business in the energy (natural gas and electricity) and telecommunications (local, long distance and data transmission services) industry can and will submit "bundled" utility service bids, including not only "delivered" natural gas and electricity to the DIP's various facilities, but also ancillary and value-added services that may help in further reducing the DIP's energy bills.[31] Instead of the replacement approach, in which an existing utility contract is simply displaced by another virtually identical but less expensive contract, this flexibility in bid-preparation inures to the estate's benefit. The DIP might be able to obtain different or additional types of services while replacing the older, more expensive services. Competition, then, opens up as many possibilities for creativity as does the plan drafting process itself: the only limits are the Code and the lawyers' imaginations.

Note, though, that sometimes price alone isn't a good enough reason to change service providers. During the summers of 2001 and 2002, California suffered from severe electric shortages and skyrocketing wholesale prices.[32] As a result of these factors, many non-generation-owning wholesale power service providers were unable to meet their contractual commitments to supply power to their customers. Nor were they in a financial position to comply with their contractual damages clauses. Several simply went out of business. The answer is simple: know with whom you're dealing. If in doubt, check them out: How long have they been in the energy business? Who are their other customers? What is their net worth? Are they bonded? If so, what are the liability limits of the bond? Have they defaulted on deliveries in the past?

The term of the contract is also obviously critical to the value of the estate. If the DIP leverages its way into a reduced natural gas or electricity rate, but the reduced rate is only guaranteed for ninety (90) days, has the DIP or, more important, the estate truly gained anything? As we stated before, the generic term for a utilities contract is likely to be in the twelve-month to twenty-four month range. In Ohio, both the twelve-month and twenty-four month time-frames are being used by electric service providers.[33] Some natural gas service providers in Ohio are requiring three-year terms. If the DIP saves the estate $25,000 a year during these time-frames, the change in service providers (sometime you can keep the same service provider but still lower the rate) is probably worth the effort.

Conclusion.

Our aim in this article is to get you excited about Retail Choice and the idea of competition in the provision of utility services. Most of the time, Chapter 11 cases evoke an image of a pie, originally made to serve 10, being forced to serve 20. Bankruptcy lawyers are used to knowing that there are few avenues available for dramatically increasing the size of the pie. Retail Choice is one of those avenues: pies that originally only served 10 could serve 20 (or at least 12) if the cost of assembling the pie were reduced (via executory contract analysis). If that were the only benefit of Retail Choice, that would be sufficient. But there's a broader implication as well: not only could these new utility contracts be cheaper, but they could be more energy-efficient as well. Imagine that: a world in which bankruptcy actually makes things better, not just for the parties involved, but also for the world in which they live.

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3 Notice of Proposed Rulemaking regarding Standard Market Design and Structure:

http://www.ferc.gov/Electric/RTO/Mrkt-Strct-comments/discussion_paper.htm#NOPR.

4 Michael Davis & Tom Fowler, *Big Changes Predicted for Energy Game,* Hous. Chron., at A1 (July 28, 2002).

5 Howard Horne, *Unplug Deregulation in Texas,* Hous. Chron., at C1 (August 4, 2002).

6 Michael Davis & Tom Fowler, *Big Changes Predicted for Energy Game,* Hous. Chron. at A1 (July 28, 2002).

7 Competition does not generally exist in the context of either water or sewer services, which remain monopoly services. Most homes and businesses have only one set of water and sewer lines running to them. Moreover, there normally exists only one provider of such service in the region. These contracts are executory contracts; however, the problem with water and sewer contracts is that the services are truly monopolistic, giving the debtor no real choice but to assume them. *See* **In re Monroe Well Serv., Inc.,** 83 B.R. 317 (E.D. Pa. 1988).

8 *See, e.g.,* **Sharon Steel Corp. v. National Fuel Gas Distrib. Corp.,** 872 F.2d 36, 39-40 (3d Cir. 1989); **In re Wheeling-Pittsburgh Steel Corp.,** 72 B.R. 845 (Bankr. W.D. Pa. 1987); **In re Electrofiromex Laboratory, Inc.,** 76 B.R. 894 (Bankr. D.R.I. 1987); 2 Norton Bankr. L. & Prac. 2d § 39:9.

9 *See, e.g.,* **In re El Paso Refinery, L.P.,** 220 B.R. 37, 39 n.1 (Bankr. W.D. Tex. 1998) ("The court's own evaluation of the contract in question satisfies the court that, regardless the imprecision of the contours of what makes a contract executory, this particular [utilities service] contract falls well within the boundaries."); **In re California Steel Co.,** 24 B.R. 185, 187 (Bankr. D. Ill. 1982) (assuming, without discussion, that an electric service contract is an executory contract); **In re TransAmerican Natural Gas Corp.,** 79 B.R. 663, 667 (Bankr. S.D. Tex. 1987) (same).

10 In his pathbreaking article(s) on executory contracts, Vern Countryman defined an executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L. Rev. 439, 460 (1973); *see also* Vern Countryman, *Executory Contacts in Bankruptcy: Part II,* 58 Minn. L. Rev. 479 (1974).

11 *See, e.g.,* Barbara C. Brown, Craig D. Hansen & Thomas J. Salerno, *Technology Licenses Under Section 365(n) of the Bankruptcy Code: The Protections Afforded the Technology User,* 95 Comm. L.J. 171, 173 (1990) ("[T]he principle of mutuality and the existence of unfulfilled obligations on both sides of an agreement are the key elements in determining whether a contract is executory under Section 365.")

12 *See* Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts,* 74 Minn. L. Rev. 227 (1989). In that article, Professor Westbrook eschews any need for the bankruptcy court to first find that a contract is executory, pointing out that "[t]he trustee must abandon or realize upon each contract right in the estate and perform or breach each contract obligation. When contract law makes certain rights and obligations interdependent, the trustee's right to realize upon the [contract's] rights will be dependent upon performance of the [contract's] obligations, as for any other contract party." *Id.* at 281 (footnotes omitted). *See also* **In re Drexel Burnham Lambert Group, Inc.,** 138 B.R. 687, 709 (Bankr. S.D.N.Y. 1992); **In re Walnut Assoc.,** 145 B.R. 489 (Bankr. E.D. Pa. 1992).

13 No pun intended.

14 Per 11 U.S.C. § 1107(a) (2000)(DIP has virtually all of the same rights, powers, and duties as a trustee).

15 Unless the utility moves the court to require an earlier decision on assumption or rejection, per 11 U.S.C. § 365(d)(2)(2000), or unless the contract itself is one that requires an earlier decision date, e.g., § 365(d)(5)(2000) (air carrier rules).

16 The ability to assume and assign an executory contract or unexpired lease—or even to assign to a third party the right to force the DIP to assign such a contract or lease, *see, e.g.,* **In re Ernst Home Ctr., Inc.,** 209 B.R. 974 (Bankr. W.D. Wash. 1997)— is a way of raising immediate cash for the DIP.

17 Although it is difficult to speculate about the size of the potential savings, it is not unreasonable to believe that a large commercial consumer could save somewhere in the range of 10% - 30% on its existing utility service contracts, depending upon the number, size and location of its facilities, its total and monthly energy needs, and the geographic location of the DIP.

18 Well, everyone except the nondebtor party to the rejected contract. As we all know, the unsecured claim for damages is a small price to pay for getting rid of an above-market utility contract.

19 Although some commercial DIPs may possess the requisite information and experience necessary to evaluate utility contracts, most probably do not. The opposite is probably true for industrial DIPs, where the vast majority are likely experienced in accessing and dealing in the electric and gas markets. Therefore, the DIP may well need to hire professionals, pursuant to 11 U.S.C. § 327, to assist it in conducting a proper utility service evaluation. (If the DIP wants to hire someone to assist in these inquiries, a utilities lawyer may meet these specific needs. However, that lawyer would have to meet the special counsel requirements of § 327(e).) But given the magnitude of the potential cost savings, the additional administrative expenses incurred by hiring special counsel is probably worth it.

20 Let's talk about these contracts for a minute. Every potential individual service provider has a different type of contract, containing potentially different terms and conditions. In Ohio alone, there are approximately 79 approved electric service providers actively lobbying customers to change service providers. *See* http://www.puc.state.oh.us/Consumer/Electric/electric.html (electric); http://www.puc.state.oh.us/Consumer/GasChoice/gaschoice.html (natural gas). Although we recognize the inherent benefit of showing what a certain contract's language might look like, we are also aware that the current contract language is changing as the service providers and the marketplace evolve. Therefore, we believe that it is more useful to the reader to identify and discuss the potentially critical issues rather than getting bogged down in specific contract boilerplate language. Discussing the specifics of any potential utility services contract is best left to a qualified utilities lawyer licensed in your particular state.

21 The type of service currently being used is critical, as it will also generally determine the price the DIP is paying for that utility service. Additionally, it will determine the priority among competing customers for use of constrained facilities. Let's assume that the DIP is a commercial retail entity with several different types of facilities (including warehouses, commercial sales, and office space), has no utilities service contracts in place with its provider, and is being served under

the standard service tariff for large commercial customers filed with the utilities commission by that local service provider. The DIP would then look at the monthly bill OR the applicable service tariff (the type of service should be identified on the monthly bill). The monthly bill or tariff states that this type of service has a set monthly customer charge (e.g., $500, regardless of the number of facilities) plus a usage rate of, say, $0.15 for the first 10,500 Kwh used each month and $0.10 for all power taken above 10,500 Kwh per month. The DIP will have to ask itself: could I do better rejecting this service arrangement and entering into a service contract with a different energy provider?

22 "Tariff Service" means that the DIP has no written contract with its current service provider and is obtaining service from that entity pursuant to the tariff terms and conditions filed with the state utility commission. Tariff service was the dominant method of providing utility service until the advent of retail choice. Since there was only one source for utility service, there was no need to sign a contract. Everyone knew who the service provider was, and what the various terms and conditions of service were going to be. Following implementation of retail choice, most service providers are seeking the security of a written contract with their customers.

23 "Firm Service" is a type of transportation service where the DIP's right to transport its product through the pipeline or across the transmission line are "firm," irrespective of any other demands on the transport system. No service is truly guaranteed, as acts of God or other delivery system failures could potentially intervene and prevent service from being delivered. For example, a tornado could destroy a pipeline pumping station or electric transmission line. However, firm service is the last type of service to be curtailed or interrupted and is, therefore, far more secure and reliable than interruptible service. Since this service is more secure and predictable, it costs more than interruptible service.

24 "Interruptible Service" is a type of transportation service where the DIP's right to transport power across a transmission line or gas through a pipeline may be interrupted or bumped by the transport system if there is an otherwise heavy demand for the transport system. For example, if there is severely cold weather in Ohio and the DIP's gas requirements in New York are being delivered from a supplier in the Gulf of Mexico, the DIP's service may be interrupted by the demands of firm service holders in Ohio. Simply stated, a pipeline has a certain volume and capacity limit. Once you reach that limit, no more gas can be pumped through the pipe. Since this service is subject to interruption or non-delivery, it generally costs less than Firm service.

25 In California, Ohio, and Pennsylvania, for example, state efforts to restructure the retail electric industry imposed a price cap on retail electricity (meaning then current retail prices could not be raised beyond their existing level) for some discrete period of time. Given the California crisis, the retail price cap in California has gone the way of the dinosaur. It was the retail price cap that put California utilities in such a dire situation, as it cannot then pass through the increased wholesale price of power to their retail or end use customers. Price caps do not, however, create a minimum price on service. Therefore, with the current exception of California, it may still be possible to obtain lower priced power than the DIP is currently paying for the same service.

26 Geographic location of the DIP's facilities can be critical in evaluating the existing energy contracts. Proximity to interstate gas pipelines and interstate transmission lines is beneficial in determining the DIP's ability to import natural gas and electric supplies from different regions and providers. It also identifies the intervening utility service providers that may need to be approached to solicit bids for utility service.

27 Some of the customer's financial risk regarding future energy prices may be reduced in the financial markets (otherwise known as "hedging" or taking a "forward position").

28 It's beyond the scope of this article to discuss any of the following: (1) the relationship between the DIP and the estate, *see, e.g.*, Stephen McJohn, *Claims & Opinions: Person or Property? On the Legal Nature of the Bankruptcy Estate*, 10 Bankr. Dev. J. 465 (1994); (2) the duties of the DIP's attorney toward the estate, *see, e.g.*, Gerald K. Smith, *Conflicts of Interest in Workouts and Bankruptcy Reorganization Cases*, 48 S.C. L. Rev. 793 (1997); C.R. Bowles & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 Am. Bankr. Inst. L. Rev. 47 (1997); or (3) the duties of the actual humans running the DIP, *see, e.g.*, Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back—Something May Be Gaining on You,"* 68 Am. Bankr. L.J. 155 (1994). But they're fun questions, aren't they?

29 We're not going to get into whether the creditors' committee has such a duty. In a big Chapter 11 case, the creditors' committee is likely to be fairly active, and the committee may well decide to participate in helping shop bids (or at least requesting that the DIP do so). After all, lower utility costs will increase the return to the unsecured creditors. In smaller Chapter 11 cases, only the DIP is likely to get involved. In very small Chapter 11 cases, even the DIP might not find it cost-effective to shop bids, although we'd certainly like to encourage any efforts in that regard.

30 Most states that have opened their local markets to competition require the various service providers to register with the state for permission to solicit and provide retail utility services. Some states, like Ohio, also require a showing of creditworthiness or financial strength as part of this application process. Therefore, the state utilities commission (or its website) can generally produce a list of the state-approved utility service providers. Take care before actually selecting a service provider, as most states have imposed few financial and experience requirements upon service providers before they can participate at the local level. The goal was to maximize participation by as many service providers as possible, whether or not those providers were financially sound businesses. As with every other business decision, it may be more prudent to select a well-known service provider with a slightly higher price than to chase the lowest possible bid by an unknown and inexperienced provider.

31 There are also many value-added and financial services (depending upon how the contract is structured) that a service provider may use to help the DIP reduce the cost of its energy services contract, including hedging, taking forward positions in the market, capacity release and various other financial products. A customer may wish to have its service provider use some or all of these methods to reduce the customer's cost of energy. Additionally, there are energy management specialists who can assist the DIP in reducing its consumption through many mechanisms, including, but not limited to, shift management (changing the number of shifts or the times when the various shifts start and end) and thermostat management (raising the thermostat in summer and lowering it in winter), replacement of light fixtures and bulbs, and tree plantings.

32 The shortages resulted from various scheduled and unsched-

uled generating unit outages, temperature-related import constraints (it seems that hot transmission lines do not conduct electricity as well as cool electric lines), and ever dwindling reserve margins (meaning that there was insufficient native or local generation to supply the local demand and power had to be imported just to meet the existing native load. These same factors lead to skyrocketing wholesale electric prices in the upper Midwest in 1998 and 1999.

33 *See* http://www.puc.state.oh.us/Consumer/Electric/electric.html (electric); http://www.puc.state.oh.us/Consumer/GasChoice/gaschoice.html (natural gas).

SOME THOUGHTS ABOUT ENRON

by
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[The Adviser *asked our resident Big Picture Guy, Prof. Jack Ayer, for some unfiltered thoughts about Enron. Here is what we got, straight from an Internet café somewhere in India.]*

1. Dupes—in retrospect, there were a fair number of non-dupes. *Fortune* ran a piece last spring—by a 31-year-old former English major. There is the researcher in Houston—is his name Olsen?—who has had a fair amount of press, including face time with Lou Dobbs. He says that one reason he was in a position to be skeptical was that he was in Houston where Enron had a lot of street buzz (why weren't the employees listening, I wonder?). But the dominant reason is that he was one of the few researchers not wedded to an investment bank and thereby not constrained to use his research as a loss leader. There are the short-sellers whose presence was evident in published data-and who, in any event, were making no secrets of what they were up to. There was the German company that backed off a merger bid. And finally, as in any major fraud—there were probably a fair number of investors playing the "greater fool" game, knowing that it was a house of cards but figuring they would take their money off the table before it fell down.

2. Employees—there are indeed problems with employee pensions, though they are perhaps harder to solve than is at first evident. It must be wrong to lock in the employees for the ride down to oblivion, just when you are bailing out on your own position (even if only "to pay off loans," heh heh). But the strongest lobby for employee participation in "their own" employer will come from the employees themselves. Have talked to a guy who knows this stuff better than I ever will—he said there was much talk back at the beginning of ERISA about forbidding employee ownership of positions in their own company. He said the principal resisitance came from employees of Sears, who "owned" their own company and thought it a very good thing, thank you. Propose this kind of diversification again and you will see before Congress a regular parade of widow-ladies explaining how they never made more than $3.15 an hour and still packed away a 401(k) of $400,000, just by being loyal to the boss (it reminds me of the "little tin box" in the musical about Mayor La Guardia). The practical fact is that employees are not sophisticated about diversification, and resist it in every way. Indeed my own take is not that employees have too much equity but that they have too little-huge chunks of retirement assets stayed stowed away in dorky money accounts through all the boom years. Even with the recent carnage, a diversified equity portfolio would have beat the money funds six ways to the jack.

3. Accountants—There are really two problems with the accounting. They overlap, but they need to be treated separately. One is the problem of consulting—the audit becomes a loss leader for the consulting practice.

This is probably solvable, although not neatly—after all, auditing is a kind of consulting: you are studying the company's procedures and telling the client where his procedures went wrong. A question: if you did prohibit auditors from consulting, the audit firms would make a lot less money. Could you really get the talent you need for such a thankless job at that pay grade?

The second problem is more basic: the person who hires the auditor is not the audience for the audit. Shareholders and creditors need good financial information. But managers hire the auditors, and managers have an incentive to lie. This problem would remain even if you did away with the problem of consulting (of course managers also need good information: one suspects that often enough they have it, even when the outside investors do not).

Note that one problem we don't seem to worry about here is the classic auditor nightmare: the client who actively deceives the auditor along with everybody else (fabricating receivables, shipping bricks as computers, juggling the ammonia tanks, whatever). In time of trouble, the auditor's first response is always "imagine my surprise!" In some cases, this is a legitimate defense. But in the recent horrors, it is very hard to take seriously.

The flip side: much is made about Enron's "complex" finances. Maybe so, but at the end of the day, most financial fiddles are absurdly simple. At the end of the day, what seems to have pulled the plug on Enron is the so-called "independent" (aka "off-balance-sheet") entities. There is nothing disrepu-